No. 91-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, THREE QUAYS UNDERWRITING MANAGEMENT LIMITED, JANSON GREEN MANAGEMENT LIMITED, MURRAY LAWRENCE & PARTNERS, D.P. MANN UNDERWRITING AGENCY LIMITED, ROBIN A.G. JACKSON, PETER N. MILLER, EDWARDS & PAYNE (UNDERWRITING AGENCIES) LIMITED, and STURGE REINSURANCE SYNDICATE MANAGEMENT LIMITED,

Petitioners,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 15.7

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SUPPLEMENTAL MEMORANDUM FOR PETITIONERS PURSUANT TO RULE 15.7

Petitioners submit this supplemental memorandum in response to the *amicus curiae* brief filed by the Solicitor General on behalf of the United States (hereinafter, "*U.S. Br.*")

ARGUMENT

The government's treatment of the international law implications of this case is curt, dismissive of the objections tendered by the British Government, and yet in the end advances no substantive position of its own. By slighting the international law ramifications of the Ninth Circuit's unprecedented expansion

of antitrust jurisdiction, the government lets rule the "parochial concept that all disputes must be resolved under our laws and in our Courts" – a point of view this Court has repeatedly condemned. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); *accord, Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

In many respects, the government's brief is more important for what it does not say than for what little it says. Nowhere does the government assert any interest of the United States in the prosecution of this action that could be measured against, let alone outweigh, that of the United Kingdom in leaving regulation of Lloyd's and the London reinsurance market to British law and institutions. The government does not dispute that in this case an unprecedented expansion of American jurisdiction would supplant the considered policies, interests and traditions of a friendly foreign sovereign. Like plaintiffs, the government does not controvert any of the reasons advanced by petitioners why the petition should be granted. Nor does the government dispute that "[t]his Court has never addressed the question whether and to what extent the extraterritorial reach of this nation's economic regulatory laws is restrained by considerations of international law and comity." *Petition* at 3.

At the same time, the government does not endorse the arguments advanced by plaintiffs why the writ should not be granted. The government makes no mention of plaintiffs' "global conspiracy" claim. *Compare Respondents' Consolidated Brief in Opposition to Petitions for Writs of Certiorari* ("*Respondents' Br.*") at 21-22. And the government does not take issue with the position of the British Government, which both courts below accepted, that implementing antitrust jurisdiction in this case raises a substantial conflict with British law and policy. *Compare Respondents Br.* at 24-25.

Although the government concedes the gravity of the international conflict this case presents, it is silent on the nature of that conflict. It does not attempt to come to grips with the fact that the three counts of the complaint which the district court

dismissed on grounds of international law and comity name only English defendants and charge exclusively foreign conduct in a market regulated by a foreign sovereign. The government all but ignores the unique institution of Lloyd's and the Lloyd's Acts (*see Petition* at 4-6) and the havoc this case will play with the British scheme of regulation which, as the British Government states, "has its origins in the history of the British insurance industry and of British competition policy, and the way in which the British Parliament has thought fit to legislate on both aspects over the years." *Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners* at 8.

The government does not say whether a standard rule of law should apply in the comity analysis, nor does it articulate a particular rule. The government does not say what weight it believes the conflict with foreign law or policy deserves in judging the reasonableness of jurisdiction in this case or in private litigation generally. The government does not even purport to apply a test, thus graphically demonstrating that this area of the law lacks clear guidance from this Court.

Furthermore, the government's discussion of the Ninth Circuit's purported balancing of factors endorses neither that court's reasoning nor its result. The government says that "the result the court of appeals reached under *Timberlane* is reasonable" (*U.S. Br.* at 23) but does not address the central point of the petition, which argues that the Ninth Circuit did not merely "misapply" *Timberlane* but instead imported wholly unrelated concepts from the Foreign Trade Antitrust Improvements Act, 15 U.S.C. §6a ("FTAIA") to relegate a conflict with foreign law and policy almost to irrelevance in the comity analysis. *See Petition* at 3, 8-9, 22-24. The government does not reject either *Timberlane* or the Ninth Circuit's sharply restricted balancing test. Instead, it strives to downplay the Ninth Circuit's misuse of the FTAIA, calling that part of the court's opinion "comments," "suggestion" and "dicta." *U.S. Br.* at 25. As shown in the petition, however, the Ninth Circuit's discussion of the FTAIA was not mere "suggestion." Rather, it was critical to the court's analysis of the role of international law in jurisdictional disputes, and it dictated the court's result.

In the end, the government merely reiterates the Ninth Circuit's "conclusions" and states that "[t]here is no reason for this Court to review that fact-specific analysis . . . at this juncture." *U.S. Br.* at 24. Yet neither plaintiffs, the court below, nor the government assert that disputed facts are at issue here or identify in what respect the issue would be better presented at a later juncture. Moreover, the application of international law in any case will be "fact-specific,"[1] but like any inquiry into whether a particular forum is proper in an international case, it must be undertaken before the litigation is complete if the concerns of other nations and the international legal system are to be respected. Contrary to the government's bare assertion, therefore, the best time to review the international law implications of the ruling of the court below is now, before a lengthy and disruptive trial has further undermined the orderly allocation of jurisdiction among nations. *Cf. Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953) (international law "aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own").

As this Court has observed before, "the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial review of the controversy over the [assertion of jurisdiction in this case]." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963). This is especially true where the actions of the plaintiff states and the decision of the court below have aroused "vigorous protest" from the foreign government concerned. *Id.*

It would be unfair to permit this case to go forward against these petitioners without review at this time. Contrary to the

[1] This Court's opinions in, for example, *Société Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) were "fact-specific", but that did not deter the Court from setting forth guidelines for future case raising the questions addressed in those decisions.

government's assertions, *see U.S. Br.* at 24, none of these petitioners has *any* legal affiliation with United States corporations, none has assets in the United States, and many are not named in other counts of the complaints besides plaintiffs' contrived "global conspiracy" count. Because, as the court below stated, complete forward-looking relief can be obtained against the American defendants on the other counts of the complaints (A-30)[2], there is no reason to allow the counts directed solely against English defendants to continue. The only result of such a course would be a gratuitous slap at a friendly foreign sovereign and a needless insult to principles of international law and comity. •

CONCLUSION

While other petitions for *certiorari* submitted in this litigation raised issues of pure antitrust law, this petition raises substantial questions of international law. In an attempt to characterize this case as only an antitrust action, the Solicitor General gave scant attention to the issues of international law and comity which persuaded Judge Schwarzer but were brushed aside by the court of appeals. This Court should grant this petition even if it believes that the concerns raised in the other petitions can be postponed until after trial.

[2] Refers to the Appendix to the *Petition for Certiorari* in No. 91-1128.

Respectfully submitted,

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